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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 618

UNITED STATES OF AMERICA, PETITIONER

v.

WORLD FIRE AND MARINE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on December 2, 1948.

OPINION BELOW

The United States District Court for the District of New Mexico did not write an opinion. Its findings of fact and judgment appear in the printed record at pages 8-12. The United States Court of Appeals for the Tenth Circuit did not write an opinion in this case, but affirmed on the authority of its opinion in *United States of America* v. *Chi-*

cago, Rock Island and Pacific Railway Company, reported at 171 F. 2d 377 [1] (R. 22).

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1948 (R. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition of R.S. 3477 (31 U.S.C. 203) against the assignment of claims against the United States, may be invoked by the United States to bar recovery of a judgment against it under the Federal Tort Claims Act by an insurance company which sues in its own name as partial subrogee on the basis of partial indemnification to the owner of property damaged by an employee of the United States.

STATUTES INVOLVED

Sections 1346 (b), 1346 (e), 1402 (b), and 2674 of Title 28, United States Code,[2] and the pertinent

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[1] The United States is petitioning for certiorari in that case also, *sub nom. United States of America, Petitioner* v. *Joseph B. Fleming and Aaron Colnon, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a Corporation.*

[2] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U. S. C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Federal Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under

provisions of R.S. 3477 as amended, 31 U.S.C. 203, are set forth in the Appendix, *infra*, pp. 16-19.

STATEMENT

A truck owned by Donald E. Harding collided on January 2, 1947, near Aragon, New Mexico, with a truck owned by the United States (R. 9). The accident was allegedly due to the negligence of the Government employee who was driving the latter vehicle (R. 1). The loss to Harding resulting from this collision amounted to $884.50, the cost of necessary repairs, and $600.00, the cost of renting a replacement truck while his own was being repaired, a total of $1,484.50 (R. 9). Respondent World Fire and Marine Insurance Company, a Connecticut corporation, under the terms of a collision insurance policy which it had issued to Harding, paid him $784.50, the cost of the repairs less a deduction of $100 provided for in the policy (R. 9-10).

Respondent World Fire and Marine Insurance Company, joining Harding as a plaintiff, brought an action against the United States under the Federal Tort Claims Act in the United States District Court for the District of New Mexico, to recover $784.50, the amount it had paid under its policy,

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the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.) The citations in this petition are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act.

together with the costs of the action, while Harding sought judgment for $700.00, the amount of his loss not covered by insurance (R. 1-3). The Government moved to dismiss respondent's complaint on the ground, *inter alia*, that the transfer to respondent of an interest in Harding's claim was null and void under R. S. 3477, 31 U. S. C. 203 (R. 3). This motion was denied (R. 5). The Government then filed an answer, and after a trial on the merits the district court found the facts as stated above and entered judgment in favor of respondent for $784.50, and in favor of Harding for $700.00 (R. 5-6, 8-12).[3]

The United States took an appeal on the points of law raised by its motion as to the right of respondent to recover (R. 12, 13). The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the district court without opinion, on the authority of its holding in *United States of America* v. *Chicago, Rock Island and Pacific Railway Company*, 171 F. 2d 377, that a "subrogee or indemnitee" may maintain an action against the United States under the Federal Tort Claims Act (R. 22).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a partial subrogee was entitled to recover judgment against the United States under the Federal Tort Claims Act.

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[3] Costs, in the amount of $43.64, were awarded to respondent (R. 11).

2. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

This is the second of a group of five cases in which the United States is seeking a determination as to certain of its basic rights as a party defendant under the Federal Tort Claims Act. The basic question in all of these cases is whether Congress intended by that Act to repeal R. S. 3477 by implication and to authorize anyone other than the person originally sustaining the loss or injury to recover judgment against the United States. In three cases of the group, this case and the two following Nos. 619 and 620, that question arises because the action was brought by an insurance company which, under the terms of its policy, had partially indemnified the original claimant for his loss, and which therefore claimed ownership by subrogation of a fractional part of the claim against the Government, with the right to maintain an action thereon in its own name. The present case is an action by an insurance company subrogee, with the original claimant joined as a plaintiff, each seeking to recover his respective portion of the claim. The next logical step, if such an action is proper, is illustrated in the two cases following, *United States of America* v. *Yorkshire Insurance Company* and *United States of America* v. *The Home Insurance Company*, Nos. 619 and 620, which were independent actions by two insurance companies, each asserting the right by subrogation to recover on a portion of the same claim.

As we have pointed out in the petition for certiorari in No. 617, *United States of America* v. *Aetna Casualty & Surety Company*, there is no necessity for depriving the Government of the protection of R. S. 3477. A recovery in the name of the original claimant will require the Government to discharge its full liability, certainly sufficient to meet the purposes of the Act. On the other hand, it is of great importance to the United States to be free to invoke R. S. 3477, 31 U. S. C. 203, as actions by derivative claimants will subject the Government to the possibility of multiple suits resulting from the splitting of causes of action, will permit venue in a district other than that in which the original claimant could have brought the action, and will defeat the Government's right of counterclaim against the original claimant. These evils are particularly apparent in such cases as the present case and in Nos. 619 and 620, as these insurance companies do not claim all, but only a part of the entire cause of action. This subdivision of a single claim increases the number of persons with whom the Government must deal, subjects the Government to the danger of becoming embroiled in conflicting claims, impedes the settlement of such claims by compromise, and deprives the Government of the certainty of a full acquittance in the discharge of its liabilities. For more than a century, Congress has protected the Government from all such contingencies and has safeguarded its in-

terests as a debtor and as a litigant by the provision, now embodied in R. S. 3477, that any transfer or assignment of a claim against the United States shall be null and void unless made after the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof. This statute and decisions of this Court construing it with fair regard for its purpose and the Government's interest compel a conclusion contrary to that reached by the court below.

1. Since the court below did not write an opinion in this case, and since its opinion in *United States of America* v. *Chicago, Rock Island and Pacific Railway Company*, 171 F. 2d 377, on the basis of which this case was decided, does not discuss the applicability of R. S. 3477 to respondent's claim as partial subrogee, there is no direct expression in the record as to the court's reason for declining to hold that R. S. 3477 barred the enforcement of the claim against the United States. Presumably, however, it adopted the ground on which respondent opposed the Government's motion to dismiss—that the transfer to it of an interest in Harding's claim was involuntary, resulting from operation of law, and hence was not barred by R. S. 3477 (R. 4).

R. S. 3477 provides that all transfers and assignments of any claim upon the United States or any interest therein, and for whatever consideration, shall be absolutely null and void unless executed in the presence of at least two witnesses, after the

allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for payment. This Court in *Goodman* v. *Niblack,* 102 U. S. 556, 560, although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * *," and has on several occasions observed that no language could be broader or more emphatic than these provisions, which embrace all transfers, whether by operation of law or otherwise. *United States* v. *Gillis,* 95 U. S. 407, 413; *Spofford* v. *Kirk,* 97 U. S. 484, 488. This Court has found that R. S. 3477 was "* * * * * passed for the protection of the government * * *", *Hobbs* v. *McLean,* 117 U. S. 567, 576, and evidences the intention of Congress to protect the Government from the "* * * danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Co.,* 300 U. S. 588, 594. Recognizing that the accomplishment of the purpose intended by Congress did not require the literal application of the provisions of the statute, this Court has excepted from its bar the instances where all the claimant's property has been transferred by operation of law to a universal successor, as by descent or bankruptcy, see *Erwin* v. *United States,* 97 U. S. 392, 397, insolvency, *Butler* v. *Goreley,* 146 U. S. 303, 311, assignment for the

benefit of creditors, the equivalent of bankruptcy, *Goodman* v. *Niblack,* 102 U. S. 556, 560-561, or consolidation in corporate reorganization, *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655, 657. In such cases it is obvious that the interests of the Government are not endangered by the transfer, as the Government deals with the substituted representative just as it would have dealt with the original claimant.

Here there was no transfer of all the claimant's property to a universal successor, or even of all of a single claim. On the contrary, respondent is asserting ownership of only *a portion* of a claim, with the right to maintain an action thereon in its own name against the United States. No decision of this Court has ever countenanced such a subdivision of a contested claim.[4] Cf. *Houston* v. *Ormes,* 252 U. S. 469, 474, which permitted the enforcement of an attorney's lien against a claim already allowed, where the duty to pay was merely ministerial, with *Nutt* v. *Knut,* 200 U. S. 12, 20-21, holding invalid a contract making the payment

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[4] Congress emphasized its opposition to the partial transfer of claims in amending R. S. 3477 to permit small contractors to assign moneys due or to become due under Government contracts so as to help them obtain financial backing in carrying out national defense contracts. While it thus relaxed the rigid limitations of the statute, Congress expressly provided that any such assignment should cover all amounts payable and not already paid, should not be made to more than one party, and should not be subject to further assignment. Act of October 9, 1940, c. 779, sec. 1, 54 Stat. 1029, amending R. S. 3477, 31 U. S. C. 203; see *Coconut Grove Exchange Bank* v. *New Amsterdam Cas. Co.,* 149 F. 2d 73, 77 (C. A. 5).

of the attorney's compensation a lien upon the claim prior to its allowance. We submit that the decision of the court below does not measure up to the requirement laid down by this Court, that R. S. 3477 "* * * must be interpreted in the light of its purpose to give protection to the Government." *Martin* v. *National Surety Co.*, 300 U. S. 588, at 596.

2. The only other possible ground on which this action by respondent could be sustained is that the Federal Tort Claims Act effected an implied repeal of R. S. 3477. Since no compelling considerations exist which require that the Act be construed as permitting the transfer of claims against the United States, it should be given a construction consistent with R. S. 3477, in view of the familiar rule that implied repeals are looked upon with disfavor. *General Motors Corp.* v. *United States*, 286 U. S. 49, 61-62; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Borden Corp.*, 308 U. S. 188; *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 209. There are, moreover, affirmative considerations which demonstrate beyond question that Congress never intended to change the law regarding the assignability of claims against the United States. Underlying R. S. 3477 is a broad Congressional policy to provide for the orderly and convenient determination of the Government's liabilities and to protect the Government's interests in discharging them. The

holding of the court below subjects the Government in a substantial degree to the "danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability," against which, as this Court said in *Martin* v. *National Surety Co.*, 300 U. S. 588, 594, it should be protected.

(a) Multiple suits with different venue on the same claim are a very real possibility stemming from the ruling below. The fact that in this particular case the subrogee joined his subrogor as a plaintiff is no more than a fortuitous circumstance, as there is nothing in the rulings of either court below which would prevent the partial subrogee from bringing his action independently in a district where his subrogor, the original claimant, could not be required to join. An example of the harmful consequences of the ruling below to the Government is the litigation which has grown out of two accidents involving Government aircraft and aircraft owned by Eastern Air Lines, Inc. One of these accidents occurred near Florence, South Carolina. The Glen Falls Indemnity Company, which was insurer for Eastern, paid Eastern $90,500 for the loss of its airplane and then brought an action in its own name under the Federal Tort Claims Act in the Southern District of Florida. This action was dismissed on the ground that plaintiff was a New York corporation and hence not a resident of the district in which the action was brought.

Thereafter, the Glen Falls Indemnity Company brought a new action, Civil No. 3021 in the Northern District of New York. Meanwhile, Eastern Air Lines, Inc., being a Delaware corporation, had brought an independent action against the United States in the District of Delaware, Civil No. 1055. The United States has a counterclaim against Eastern for $193,557.56 based on the same accident, and is asserting that counterclaim in the Delaware action. The other accident, which occurred at Nashville, Tennessee, is the basis for similar litigation, except that there the Government is not asserting a counterclaim. Thus, in each instance, a single accident is currently the subject of two suits, one brought by the original claimant in the district of its residence, the other brought by an insurance company subrogee in the district of its residence.[5]

Another example of the vexatious litigation made possible by the holding below is an action brought by the Old Colony Insurance Company. Old Colony, having indemnified a policy holder for all but $50.00 of the damage sustained when an Army truck ran into his automobile, brought an

[5] The ruling below, that a single cause of action may be split and separately prosecuted, permits venue to be laid as to each portion of the cause of action in different districts. Actions under the Federal Tort Claims Act "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U. S. C. 1402 (b). Presumably, under the venue provision of revised Title 28, an insurance company subrogee could prosecute its portion of a cause of action against the United States under the Federal Tort Claims Act in any district where it was doing business. 28 U. S. C. 1391 (c).

action against the United States under the Federal Tort Claims Act to recover the amount it had paid out. The district court dismissed the action on the ground that the Act did not authorize the maintenance of an action by a subrogee. On appeal the United States Court of Appeals for the Sixth Circuit reversed, holding that as a subrogee Old Colony was a "claimant" within the meaning of the Act, and that it was also the real party in interest under Rule 17 of the Federal Rules of Civil Procedure. *Old Colony Ins. Co.* v. *United States*, 168 F. 2d 931, 933, 934 (C. A. 6). Meanwhile the original claimant had applied to the Department of the Army for an administrative adjustment of his claim under 28 U. S. C. 2672, which authorizes the administrative settlement of claims under $1,000.00. The attorneys handling the case for the Government were never advised of this fact, as the Department of the Army failed to discover that a claim which was the subject of an application for administrative adjustment by one claimant was also the subject of an action brought in the name of an entirely different claimant. Government counsel received their first information regarding this application immediately before the argument of the case in the Court of Appeals, when counsel for the Old Colony Insurance Company advised that he had a check which had been issued to the original claimant by the Department of the Army for the full amount of his loss, and Government counsel proceeded with the argument of the

case on the understanding that the check would be returned. The check was not returned, however, but was retained and cashed after the Court of Appeals had rendered its decision upholding the right of the partial subrogee to sue and recover under the Tort Claims Act. The cashing of the check prevented the Government from seeking a review of that decision by this Court on certiorari, as the payment of the claim rendered the case moot.

We refer to these cases solely for the purpose of demonstrating that the considerations which we urge are not hypothetical, but instead represent the practical problems already encountered in the defense of actions under the Federal Tort Claims Act. True, the claim here involved is not the subject of multiple actions. However, the principle established by the decision below—that a partial subrogee may prosecute his portion of a claim to judgment in his own name—makes such multiple actions possible. Unquestionably R. S. 3477 evidences the intention of Congress to assure the Government of a single and complete discharge of its obligations to those having claims against it. We submit that Congress did not intend to deprive the Government of that certainty in dealing with claimants under the Federal Tort Claims Act.

(b) In holding that a partial subrogee has an absolute right to recover judgment in his own name against the United States, the court below has in-

creased the number of persons with whom the Government must deal in the determination and discharge of its liabilities, a result clearly in conflict with the policy of R. S. 3477 as recognized by this Court. Under this decision, the Government is not free to deal solely with the original claimant in negotiations looking to a settlement of the claim and may not rely upon a release executed by the original claimant alone. Unless the original claimant's insurer also joins in the release, the Government may be subjected to a later suit. 7 Cooley on Insurance (2d ed., 1928), p. 6712; 8 Couch on Insurance, sec. 2001, pp. 6601-6602. Thus the Government will not only be embarrassed in its settlement negotiations, particularly where it has a set-off or counterclaim against the original claimant, but may also become embroiled in conflicting claims between the original claimant and his insurer. Moreover, decentralized administrative settlement of claims by the various departments and agencies becomes impossible. Obviously Congress did not intend any such result in passing the Federal Tort Claims Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

APPENDIX

STATUTES INVOLVED

1. Sections 1346 (b), 1346 (c), 1402 (b), and 2674 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. [the provisions of the above sections having been formerly embraced in Sections 410 (a) and 411 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-844, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U.S.C. 931 (a) and 932] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 173[6] of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in ac-

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[6] Apparently should read "171," since that is the number of the chapter on Tort Claims Procedure.

cordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

* * * * *

28 U. S. C. 1402. *United States as defendant.*

* * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries re-

sulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

2. R. S. 3477, as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not

apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

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